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No. 35316-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

DAVID M. HENDERSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK McCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Factual Background.

Mr. Rocky Johnson builds and races cars. (RP 12). On July 5, 2005, he went to his racing trailer which was located in Moclips, Washington. He found that the side door to the trailer was open. The inside of the trailer was in disarray. Personal property items were stolen. (RP 12-13). Missing items included a set of wheels, an aluminum oil pan, fuel pump extensions, and a small stereo. (RP 14).

On July 5, 2005, the defendant sold the wheels and other items taken in the break-in to Butcher's Scrap Metal in Hoquiam. (RP 20-21). Later in the day Mr. Butcher received a call from a friend, Ken Grover, who told him to be on the lookout for Mr. Johnson's stolen property. When he realized what he had, Mr. Butcher called Rocky Johnson. (RP 22).

Deputy Youmans of the Grays Harbor County Sheriff's Office subsequently went to Butcher's Scrap Metal and recovered Mr. Johnson's stolen property. (RP 28, Ex. 1, 2, 3). Mr. Johnson identified these items at trial. (RP 14-15).

As it turns out, the defendant lived about 200 yards from where Mr. Johnson had parked his racing trailer. (RP 30). The defendant lived there with his girlfriend and her son, Ben Martinez. (RP 30-31). Officers located the defendant on July 19, 2005. The defendant returned with them to his residence where he gave them a consent to search. Officers recovered additional stolen property belonging to Mr. Johnson. Officers also interviewed the defendant.

Initially, the defendant admitted having the wheels but claimed that he obtained them from friends of his in Tacoma. (RP 33-34, 39-40). The defendant stated that he got them on the evening of July 4th. (RP 40). During the course of the interview, the defendant was told that the officers knew he had sold the items at Butcher's Scrap Metal. They told the defendant that they did not believe the story about his friends from Tacoma. (RP 41-42).

At this point, the defendant stated that he did not want to get his girlfriend's son, Ben Martinez, in any trouble. He explained that Martinez had brought the items to his trailer. The defendant admitted telling Martinez to quit bringing "stolen stuff" to his house. According to the defendant, Martinez wanted to sell the items. The defendant told the officers that in order to avoid trouble with his girlfriend he drove Martinez to Butcher's and sold the wheels for him. (RP 42-43). These admissions were included in a written statement signed by the defendant. (RP 43, Ex. 4).

Procedural History.

The defendant was charged by Information on July 20, 2005, with Trafficking in Stolen Property in the First Degree, RCW 9A.82.050. (CP 1). A CrR 3.5 hearing was held on March 14, 2006. The statements were found admissible. Findings were entered on March 20, 2006. The matter was tried to a jury on May 31, 2006. The jury returned a verdict of guilty as charged.

Sentencing was held on August 7, 2006. As part of the record at sentencing, the state submitted a Statement of Prosecuting Attorney to the court and counsel. (CP 20-22). This reflected that the defendant had been convicted in Grays Harbor County Cause No. 04-1-434-1 of VUCSA - Possession of a Controlled Substance and Possession of Stolen Property in the Second Degree. Additionally, at sentencing the State mentioned to the court that the defendant had these prior convictions. (RP 85). The defendant did not challenge the criminal history as presented. The court found that the defendant had an offender score of 2, and a standard range of a year and a day to 14 months in prison. The defendant was sentenced to serve 1 year and 1 day in prison.

RESPONSE TO ASSIGNMENTS OF ERROR

1. **The trial court property instructed the jury that in order to convict the defendant each element of the crime must be proved beyond a reasonable doubt. (Response to Assignment of Error No. 1).**

The court prepared instructions in which the jury was given three potential options concerning the verdict: guilty of Trafficking in Stolen Property in the First Degree, guilty of Trafficking in Stolen Property in the Second Degree and not guilty. A person commits Trafficking in Stolen Property in the First Degree if he knowingly traffics in stolen property. RCW 9.94A.050. The trial court instructed the jury that in order to convict the defendant as charged it must find each of the above elements beyond a reasonable doubt (Instruction No. 4). The court properly defined reasonable doubt (Instruction No. 3, WPIC 4.01).

The jury was also instructed that it could deliberate concerning the lesser offense of Trafficking in Stolen Property in the Second Degree (Instruction No. 7, WPIC 4.11). Unfortunately, the second paragraph of that instruction contained a typographical error:

> The crime of trafficking in stolen property in the first degree necessarily includes the lesser crime of trafficking in stolen property in the second degree. A person commits the crime of trafficking in stolen property in the **first** degree when he recklessly traffics in stolen property.

Obviously, the instruction should have read "a person commits the crime of trafficking in stolen property in the **second** degree when he recklessly traffics in stolen property in the second degree." The court followed, however, with the "to convict" instruction which properly set forth the elements of trafficking in stolen property in the second degree. (Instruction No. 8).

The jury was not confused by this minor error. Indeed, the trial court, when reading the instructions to the jury left out the words "in the first Degree" from Instruction No. 7. (Suppl. RP 7). It is incumbent upon this court to review each jury instruction in context and read it together with the other jury instructions given by the court. State v. Jackman, 156 Wn.2d 736, 743 (2006). This court must review the challenged instruction in the "...context of the instructions as a whole." State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

The jury was specifically told what elements need to be proven beyond a reasonable doubt to convict in each of the "to convict" instructions. The elements were all properly set forth. The jury had this "yardstick" to reach its verdict. State v. Smith, 13 Wn.2d 258, 263, 930 P.2d 917 (1997).

The jury is presumed to have followed the court's instruction. State v. Teal, 152 Wn.2d 333, 342, 96 P.3d 974 (2004). Although Instruction No. 7 does not mirror the "to convict" instruction, in context, it only applies to the to convict instruction for the lesser degree of Trafficking in Stolen Property in the Second Degree. The "to convict" instruction for Trafficking in Stolen Property in the Second Degree was proper. (Instruction No. 8). The instructions when read as a whole are not misleading. State v. Chase, 134 Wn.App. 792, 803, 142 P.3d 630 (2006).

The jury was precluded from finding the defendant guilty of Trafficking in Stolen Property in the First Degree unless every essential

element of that crime, including the element of knowledge, was proven beyond a reasonable doubt (Instruction No. 4). It is clear from a review of the instructions as a whole that the typographical error in Instruction No. 7 was harmless beyond a reasonable doubt. At best, even if this court finds error, the court should direct a verdict for Trafficking in Stolen Property in the Second Degree.

2. **The trial court properly determined the defendant's offender score. (Response to Assignment of Error No. 2).**

A sentencing hearing was held. When passing sentence the court may rely upon the facts proven at the sentencing hearing and acknowledged by the defendant. Specifically, RCW 9.94A.530(2) provides as follows:

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

The Statement of Prosecuting Attorney set forth the defendant's criminal history, all of which occurred in the same court less than two years prior. The State, in its remarks, referenced the information in the Statement of Prosecuting Attorney, commenting that the defendant had these prior convictions. (RP 85). No dispute of any kind was raised concerning the defendant's criminal history. His criminal history was a matter of record in the very court where he was being sentenced. The sentencing court could have reviewed the file concerning the prior convictions listed as criminal history for the defendant. State v. Mail, 121 Wn.2d 707, 854 P.2d 1042 (1993). Accordingly, the trial court was entitled to rely upon the information submitted to it in determining the defendant's criminal history, offender score and standard range.

In order to dispute any information presented for consideration at a sentencing hearing, a defendant must make a specific challenge to the information. State v. Garza, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994). The objection must be specific and timely. State v. Handley, 115 Wn.2d 275, 283, 796 P.2d 1266 (1990). No objection of any kind was made.

The short answer is that the trial court properly determined the offender score based upon the evidence presented. This assignment of error must be rejected.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: Gerald R. Fuller
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID M. HENDERSON, Appellant.	No.: 35316-4-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 22nd day of March, 2007, I mailed a copy of the BRIEF OF THE RESPONDENT to Jodi Backlund; Backlund & Mistry; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189, and David M. Henderson; c/o William Henderson; 3152 - 116th Avenue Southeast; Auburn, WA 98509, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman

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